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(No notice of attorney representation)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CAPT. JAMES LINLOR, pro se Plaintiff, v. MICHAEL POLSON, in his individual capacity Defendant	)	Case No.: 1:17cv13 (AJT/JFA) **PLAINTIFF'S REPLY TO TSA MOTION TO QUASH SUBPOENA OF DOCUMENTS BY 3RD PARTY WILLIAM WHETSELL IN HIS INDIVIDUAL CAPACITY** No oral arguments requested (waived). Hearing: Friday, 20 October 2017 Time: 10:00 am Judge: Hon. John F. Anderson Note: 20 October chosen per Scheduling Order; Plaintiff is traveling to Virginia on 19 October.

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1. TSA requested an undefined "expedited procedure" for this Motion, and requested a Thursday 19 October hearing without consulting Plaintiff, despite reasonably knowing that Plaintiff is slated to be traveling cross-country on 10/19 for depositions on 10/20.
2. 3rd party TSA did not follow CivLR 7E or 37E, and their Motion should be DENIED based on these violations and misrepresentations to the Court.
3. 3rd party Mr. William Whetsell was served in his individual capacity; TSA documents are within Mr. Whetsell's possession, custody, or control, and are specifically relevant as identified in Defendant's disclosures, justifying that TSA's Motion should be DENIED.
4. Mr. Whetsell and TSA filed numerous false statements. Separate Notices to Admit and Notice of Pending Motion for Rule 11 Sanctions are being filed with the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

If a tree falls in a forest and nobody hears it, does it make a sound?

If a Party produces a Notice or receives an authorized Subpoena but does not serve them, is Service Perfected?

Five primary issues are at-bar, replying to the issue of TSA's motion to Quash Subpoena, all summarized here with details below:

- False claims of implied violence and threats, alleged by TSA counsel against Plaintiff, allegedly made against Mr. Whetsell and his family
  - Plaintiff seeks sealing and/or Ordered correction, and *sua sponte* sanctions against TSA counsel for filing known falsehoods to harrasss Plaintiff
- Alleged lack of compliance with CivLR 7E and 37E by TSA counsel
  - Plaintiff seeks DENIAL of TSA's motion
- Conflicting guidance between regulations, 49 USC 114(r), 49 USC 1520.5(4)(A)-(B), 49 USC 15.11(a)(4-5), and 49 USC 1520.11(a)(4-5) all authorizing and compelling release of all subpoenaed documents to Plaintiff, all vs. 6 CFR 5.41-5.49 which TSA self-servingly claims overrides all the other regulations to restrict reasonable discovery, although 49 USC 114(r) contains a pre-empting clause granting it precedence over "any other provision of law", designating it as controlling and thereby defeating claims by TSA under 6 CFR 5.41-5.49.
  - Plaintiff seeks DENIAL of TSA's Motion and *sua sponte* Contempt of Court if TSA does not produce the few, focused documents authorized and compelled under 49 USC 114(r) that are a subset of what Defendant already identified as relevant to this case at Mr. Whetsell's deposition on 20 October 2017.
- Prior to TSA's Motion, TSA and Defendant refused to disclose any representation for Mr. Whetsell, who was explicitly served in his individual capacity by a professional process server and service filed with the Court. Does TSA have standing to file its Motion to Quash, or does TSA's unclear extension of representation in its Motion provide notice to support standing for TSA?
  - Plaintiff seeks DENIAL of TSA's motion

- Does federal case law and SCOTUS precedent concerning custody and control of documents, plus 49 USC 114(r), supercede 6 CFR 5.41-5.49 which TSA self-servingly claims overrides all the other regulations to restrict reasonable discovery
  - Plaintiff seeks DENIAL of TSA's motion and *sua sponte* Contempt of Court if TSA does not produce the few, focused documents Ordered by Subpoena

KEY POINTS OF CONFLICTS LISTED ABOVE, WITH REBUTTAL TO TSA'S ARGUMENTS USING TSA NUMBERING PROVIDED IN THE NEXT SECTION

A) Are **false claims** of violence and threats alleged by Attorney Sylvertooth against Plaintiff cause for sanctions *sua sponte* against Mr. Sylvertooth by the Court?

1. Attorney Sylvertooth insinuates that Plaintiff accosted Mr. Whetsell and his family, and may have threatened to cause them harm (see Doc # 139, Introduction Section, pg ID #868).
2. This is utterly false! Plaintiff did nothing at all to warrant any claims of threats, Plaintiff has never had contact with Mr. Whetsell since meeting him at Dulles Airport on 10 March 2016, Plaintiff was not even in Virginia this whole month of October, and the fact that a professional process server (NOT Plaintiff) personally and respectfully served legal documents (the Rule 30 Notice of Deposition) on Mr. Whetsell does not warrant the false claims of accosting or claimed threats of violence! Proof of service has been filed with the Court.
3. Plaintiff contacted TSA Counsel via voicemail at 8:50a on Monday 16 October asking TSA to withdraw its Motion to Quash based on the knowingly false statements above (since TSA Counsel is aware that a process server properly served documents on Mr. Whetsell, and nothing improper was done by anyone). Plaintiff attempted to meet-and-confer and left a voicemail that if TSA does not withdraw its motion with incorrect allegations violating FRCP 11(b), that Plaintiff will file a Notice of Intent to Request Sanctions under FRCP 11 against TSA and TSA's Counsel Sylvertooth.
4. Contrary to the multiple upper case clear statements of "WILLIAM WHETSELL IN HIS INDIVIDUAL CAPACITY" (See Exhibit B) and Mr.

Whetsell being listed by Mr. Sylvertooth as a party without an attorney (Exhibit A), Mr. Sylvertooth bases his primary argument on the false conclusions of a TSA-reprsentative capacity – this is further addressed below in this reply.

5. TSA Counsel, despite Plaintiff's discussing this in Plaintiff's meet-and-confer request with Mr. Sylvertooth, refused to provide any contact address for Mr. Whetsell. Plaintiff was required per FRCP 30 to provide reasonable notice of the 20 October deposition, and therefore had a process server locate and serve Mr. Whetsell for the Notice of Deposition, and on Friday 13 October, Mr. Whetsell was personally served the Subpoena, both by process server. Since it is unclear if Mr. Whetsell has representation, Plaintiff is having a process server send by certified mail a copy of this reply to Mr. Whetsell.
6. Plaintiff will be serving Mr. Sylvertooth with a Notice to Admit, and Notice of Intent to Seek Sanctions under Rule 11, but this does not undo the court-filed false allegations of threats made by Mr. Sylvertooth, now in public filings.
7. Plaintiff requests that the Court *sua sponte* Order that TSA Attorney Sylvertooth be immediately sanctioned *sua sponte* by:
    i. Ordering that filing Doc # 139 be ordered SEALED and refiled with corrections removing the false allegations of threats, as it contains false and defamatory allegations of threats that never occurred;
    ii. Ordering that Attorney Sylvertooth be admonished and warned that he will receive severe sanctions should he repeat any future false allegations;
    iii. Ordering that TSA shall cooperate to produce responsive documents as Ordered by the Subpoena or be found in Contempt of Court;
    iv. DENIAL of TSA's Motion to Quash for violations of Rule 11(b) and conduct unbecoming of an officer of the court by Attorney Sylvertooth, and that this notification be placed in Mr. Sylvertooth's public record.

B) Is good faith compliance with CivLR 7E and 37E supported by a single phone call by Defense Counsel, un-preplanned, with filing of a Motion to Quash around **3 hours after the phone voicemail**, when Defense Counsel waited (perhaps intentionally) for **3 FULL DAYS** to contact Plaintiff, or does this warrant

circumventing non-compliance with CivLR 7E and 37E (see footnote 1, this page) justifying DENIAL of TSA's Motion to Quash without further consideration?

1. Defense Counsel received notice of the Court's Rule 45 approval of a subpoena around 1:30p EDT on Tuesday 10 October.
2. Defense Counsel waited 3 full days until 1:35p EDT on Friday 13 October to call Plaintiff and leave a voicemail to meet-and-confer, and then filed Doc #138 around 4:50 pm EDT, approximately 3 hours and 15 minutes later.
3. The transcript of Defense Counsel's voicemail (see below), which was not received by Plaintiff until late in the night of 13 October, only speaks to "discussing a document request" but not to any potential Motion to Quash.
4. Therefore, Defendant has not met the standards[1], in time or content or good faith efforts of CivLR 7E or 37E to authorize Defendant's Motion to Quash.
5. "*Capt. Linlor, this is Dontae Sylvertooth with the AUSA's office. I'm calling about the deposition for Mr. Whetsell specifically in regards to the document request. I want to speak to you regarding that and apparently the serving of a notice of deposition at Mr. Whetsell's home. If you could please give me a call I'd greatly appreciate it. My number is (703) 299-3738.*" (transcript of call from Defense Counsel, recorded at 1:35pm EDT on Friday 13 October to Plaintiff's voicemail, and received by Plaintiff around 11pm PDT on 13 Oct.)

C) When an individually unrepresented party (no noticed Counsel for Mr. Whetsell, see Exhibit A, nor any notice received since then until an innocuous reference in TSA's Motion) does TSA's attorney have standing to represent the employee in the employee's individual capacity (see Exhibit B), without the employer's attorney formally and explicitly notifying the Court Plaintiff of this representation in the party's individual capacity?

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1 CivLR 37E states in part: "No motion concerning discovery matters may be filed until counsel shall have conferred in person or by telephone to explore with opposing counsel the possibility of resolving the discovery matters in controversy. [emph. added] The Court will not consider any motion concerning discovery matters unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters at issue." Defense Counsel does not give any excuse, nor is one allowed, for blatant refusal to follow this rule.

1. TSA has **not** notified Plaintiff as representing Mr. Whetsell in any capacity, particularly Mr. Whetsell's individual capacity, in violation of FRCP 11(c), supporting the Court's inherent power to DENY TSA's Motion to Quash.
2. Defense Counsel Sylvertooth previously did not notify Plaintiff of Sylvertooth's representation as Counsel for TSA until **after** responses from a Rule 45 Court-issued subpoena were not timely received, in violation of FRCP 11(c). Mr. Sylvertooth's actions are uncooperative and their repetition proves that they are not accidental.

D) Is information identified by Defendant as being in the posession, custody, or control of as-relevant (see Exhibit A) and an even more limited subset as approved by this Court, allowed to be restricted by an employer (TSA) when it is in the individual capacity (Mr. Whetsell's) party's possession, custody, or control as defined, "documents that are potentially relevant to likely litigation "are considered to be under a party's control when that party has 'the right, authority, or practical ability to obtain the documents from a non-party to the action.'" Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 515 (D. Md. 2009)

1. Defendant Polson identifies Mr. Whetsell, not TSA (per FRCP 26(a)(1)(A)(i) as having discoverable information referenced in the subpoena at-bar and in Exhibit A. This implies that Mr. Whetsell, not TSA, shall furnish the information requested.
2. "Control" in this context has also been defined as "the legal right, authority, or ability to obtain upon demand documents in the possession of another." American Rock Salt Co. v. Norfolk Southern Corp., 228 F.R.D. 426, 460 (W.D.N.Y. 2005)
3. Mr. Whetsell has admitted to be employed by TSA, and TSA's attorney Mr. Sylvertooth has affirmed, so Mr. Whetsell should have the ability to obtain upon demand the documents that govern Mr. Whetsell's job for pressure force to use on passengers thighs, groins, and genetilia during pat-downs. TSA's claiming that Mr. Whetsell cannot access or obtain this information implies that Mr. Whetsell has no job guidance, which contradicts Defendant's Counsel Murley's statements of Defendant Polson to have followed TSA guidance.

4. The documents requested are/were part of both Mr. Whetsell's and Mr. Polson's job functions, on which they were trained, including ostensibly in how to avoid excessive force during pat-downs of passengers. Both Mssrs. Whetsell and Polson would have been obligated to obtain the documents from a non-party (TSA) to this action, and to obtain such documents on-demand, for recurrency or other on-the-job ("OJT") training or questions/evaluation in relation to an alleged use of excessive force in a pat-down (as Plaintiff has alleged).
5. Defendant Polson, and his attorney (Mr. Sylvertooth) identified Mr. Whetsell as having information including "TSA rules, regulations, and policies concerning the aviation screening process." (See Exhibit A) Indeed, this broad category as listed by Defendant Polson and his joint-individual capacity and TSA-representing attorney Mr. Sylvertooth, appear **intentionally OVER-broad** so as to induce Plaintiff to request exactly what they described, so that TSA could then attempt to invoke SSI over their full compilations of rules, regulations, and policies in their SOP. (Standard Operating Procedures)
6. Defendants appear befuddled and angry at Platintiff's reasonable and Court-approved request for a much more modest and core-issue-specific request to understand how TSA avoids excessive force in pat-downs of thighs, groins, and genitalia, and how TSOs are trained in this manner and their behavior graded, particularly in case of an excessive force allegation (as in this case).
7. Plaintiff's Court-approved subpoena to individual-capacity 3rd party Mr. Whetsell is therefore exceedingly focused, and does not attempt to cover the entire "aviation screening process" as Defendant Polson offered, but rather, merely as listed on the subpoena as approved, which are clearly a small subset as reflected on the subpoena for documents William Whetsell shall produce:

> "TSA standards and training guidelines, practices, and procedures' ("Guidance") related to pressure used by TSOs in passenger pat-downs of thighs, groins, and genitals in pat-downs, plus the same Guidance used to ensure that excessive force is not used in pat-downs."

RESPONSE TO TSA'S MOTION USING TSA'S NUMBERING

Introduction (no numbering used by TSA; standard numbering will be used)

1. TSA did not meet the meet-and-confer requirements per CivLR 7E and 37E as described above and falsely implied in TSA's footnote given the timeline listed above. Therefore, TSA's' Motion to Quash should be DENIED.
2. TSA claims that the requested documents listed on the subpoena (see above) are sensitive security information ("SSI"), however TSA does not meet the pleading standards and justifications required under Gordon v. FBI (see below).
3. In Gordon v. FBI (ND Calif, 2004), the Court held that "General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden." The Court ruled that the FBI and TSA improperly made numerous "frivolous claims of exemption" for "innocuous" information, much of which is "common sense and widely known." For example, "[s]ome of the information redacted" by marking it SSI, "merely recites that the Watch Lists include persons who pose a threat to aviation" which were insufficient for redaction or non-disclosure.
4. Even the minimal information requested ("TSA standards and training guidelines, practices, and procedures' ("Guidance") related to pressure used by TSOs in passenger pat-downs of thighs, groins, and genitals in pat-downs, plus the same Guidance used to ensure that excessive force is not used in pat-downs.") is not widely known, TSA fails in its pleading to demonstrate how the information requested is a threat to transportation security. For this reason, TSA's motion to quash should be denied.
5. It is more likely that TSA's claims in this situation are an attempt to conceal relevant, incriminating information from Plaintiff.
   A) Precedent from. Department of Homeland Security (DHS) v. MacLean on appeal from the 9th Circuit and Federal Circuit Court, SCOTUS (574 US 2015, or 13-894 Fed. Cir. 2015) further held that TSA and DHS had indeed retroactively categorized information as Sensitive Security Information ("SSI") (similar to Law Enforcement Sensitive "LES" information) in an attempt to conceal it, and then used such identifications as having the force of law.

B) SCOTUS held that such regulations have no force of law regardless of the situation, and moreover are therefore not a basis for Defendant's reliance on them in his SSI or LES refusals to disclose relevant and requested items by Plaintiff under FRCP 33 and 34. Per SCOTUS on page 3 of its ruling held that, "Thus, it is the TSA's regulations—not the statute—that prohibited MacLean's disclosure, and those regulations do not qualify as 'law' under Section 2302(b)(8)(A)."

C) Even ***IF*** TSA's claim that the information requested is somehow SSI, CFR authorizes it's disclosure and codifies that SSI may not be used as an excuse to withold information:

i. 49 USC 114(r), for which the Limitations (listed below) explicitly state that SSI may not be used to "conceal a violation of law …, prevent embarrassment …, [or] prevent or delay the release of information that does not require protection in the interest of transportation security."

ii. "(4) LIMITATIONS.—Nothing in this subsection, or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)—

(A) to conceal a violation of law, inefficiency, or administrative error;

(B) to prevent embarrassment to a person, organization, or agency;

(C) to restrain competition; or

(D) to prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security."

iii. And if that weren't enough, 49 USC 15.11 and 49 USC 1520.11(a)(4-5) (see below) authorize Plaintiff to receive unredacted discovery of SSI which also removes any justification for approval and delay by TSA or other agencies for SSI (since they would not be performing any function, no review is warranted):

iv. (a)(4) When the person needs the information to provide technical or legal advice to a covered person regarding transportation security requirements of Federal law.

v. (a)(5) When the person needs the information to represent a covered person in connection with any judicial or administrative proceeding regarding those requirements.

vi. As referenced above, a "covered person" includes any person authorized to receive SSI (thereby "covered") including commercial airline pilots (for which Plaintiff is certificated and has been authorized to receive SSI for over 20 years). "Those with a need to know [SSI] include persons outside of TSA, such as airport operators, aircraft operators, …." (see DHS/TSA/FAA Policies and Procedures regarding SSI, 2003).

D) The sections above are also significant because (as will be discussed) TSA later attempts to cover itself under 6 CFR 5.41-5.49, though 49 USC 114(r) specifically claims precedence over 6 CFR 5.41-5.49 (which is a DHS rule clearly enacted to attempt to subvert discovery and evidence of truth in litigation.

i. The basis in TSA's argument is that the meager information requested by Plaintiff and authorized by this Court is SSI, and so cannot be disclosed (though in failing to meet the standards of Gordon v. FBI (ND Calif, 2004) listed previously, that Court held that "General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden.", TSA does not explain why pressure guidance to TSOs of thighs, groins, and genitalia cannot be released and why this information is a threat to transportation security).

ii. The relevant part of 49 USC 114(r) pre-empting 6 CFR 5.41-5.49 are: Nothing in this subsection, **or ANY OTHER PROVISION of law** [emph. added], shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)— [emphases added]

(A) to conceal a violation of law, inefficiency, or administrative error;

(B) to <u>prevent embarrassment to a person, organization, or agency</u>;

E) TSA therefore has no basis for witholding the reasonable, relevant and critical information requested by Plaintiff.

i. If not produced, then Defendant and Mr Whetsell will be able to claim any procedure they want, albeit as heresay subject to objections, but which will not satisfy the search for truth and relevant, critical evidence to this case.

ii. TSA's objections, particularly given Defendant Polson's claiming of this "Guidance" as relevant, raise the question of what fear TSA may have of discovery of incriminating evidence, rather than any risk to transportation security.

iii. This unclear conflict from the preceding paragraph violates explicitly 49 USC 114(r) which states that SSI may not be used "(A) to conceal a violation of law, inefficiency, or administrative error; or (B) to prevent embarrassment to a person, organization, or agency;

iv. Plaintiff alleges both of these aspects as the only reasons, rather than transportation security, support DENIAL of TSA's motion to quash.

6. TSA false alleges that Plaintiff personally served any Notices on Mr. Whetsell, and alleges that proper service by a 3rd party professional process server on an unrepresented party (Mr. Whetsell) is "against Federal rules."

A) The true facts (see Exhibit A) are that TSA has not previously claimed any representation of Mr. Whetsell.

B) Mr. Whetsell was served in his individual capacity (see Exhibit B).

C) Libelous insinuations of threats of violence are repulsive and Plaintiff vehemently objects ("Plaintiff did not act aggressively towards STSO Whetsell") that these are are an attempt to mislead the Court since Plaintiff did not serve or go anywhere towards Mr. Whetsell's home or family, and was never even in Virginia! Plaintiff will include a demand for this correction to TSA in a Notice to Admit, and Notice of Intent to Seek Sanctions to TSA Counsel and Mr. Whetsell, who have both clearly crossed the line and violated FRCP 11(b).

7. TSA claims that TSA agents are sensitive about individuals contacting them at their homes.
   A) Plaintiff reminds TSA's attorney that TSA agents hold no special standing or law exempting them from service at-home by registered process server, which is what happened in this case, without Plaintiff's presence or even knowledge of Mr. Whetsell's address.
   B) Plaintiff reminds TSA's attorney that TSA refused to cooperate with Plaintiff, and (see Exhibit A) TSA did not offer to act as counsel nor a conduit for service of process for Mr. Whetsell (who is NOT a Defendant in this case, contrary to TSA's attorney's misrepresentations.
   C) Plaintiff reminds TSA's attorney that Plaintiff requested that this whole case be placed under Seal, or at least redacted, but the Hon. Judge Cacheris ruled that Plaintiff had to proceed in his full name and address to remain a party. If Mr. Whetsell is unhappy, accordingly with **his** full name and address being published also, he should take that up with the Court or if/when he retains an attorney in his individual capacity, not with Plaintiff.
   D) While Mr. Sylvertooth contends that Plaintiff should not have a process server personally serve a Notice of a Deposition in Mr. Whetsell's Individual Capacity, 6 CFR 5.42(d) contradicts this, stating that "(d) Although the Department is not an agent for the service of process upon its employees with respect to purely personal, non-official litigation [in Mr. Whetsell's individual capacity], the Department recognizes that its employees should not use their official positions to evade their personal obligations and will, therefore, counsel and encourage Department employees to accept service of process in appropriate cases.
8. Defendant's required Rule 26 Disclosures, specifically Rule 26(a)(1)(A)(i) names of those "with discoverable information," is listed in Exhibit A.
9. Defendant did not provide addresses for anyone.
10. Defendant listed Mr. William Whetsell, without an attorney.
11. Defendant has not updated his Rule 26 filings if they have changed, as required under Rule 26(a)(1)(A)(i).

12. Plaintiff met-and-conferred telephonically with Defense Counsel Sylvertooth around 25 September to point out the lack of addresses, and to request that Defendant provide addresses.
13. At the same meet-and-confer, Plaintiff asked Defense Counsel if any of the Rule 26 disclosures or Privilege Log items, had changed. Defense Counsel confirmed that none had, and that he would immediately advise Plaintiff if any changed.
14. Mr. Sylvertooth reiterated that Defendant (and that he as Defendant's Counsel) did not have any of the requested addresses in his "possession, custody, or control." Since the parties could not agree, Plaintiff was compelled to seek a Court-approved subpoena under FRCP 45, as proper under 49 USC 114(r), 49 USC 1520.5(4)(A)-(B), 49 USC 15.11(a)(4-5), and 49 USC 1520.11(a)(4-5) all authorizing and compelling release of all subpoenaed documents to Plaintiff.
15. Defendant's Rule 26 Disclsoures were signed by Attorney Sylvertooth, as well as Attorney Barghaan and US Attorney Dana Boente (see Exhibit A).
16. FRCP 30(a)(1) states that "A party may, by oral questions, depose any person, including a party, without leave of the court ...." since Deponent (Mr. Whetsell) was requested in his individual capacity (see Exhibit B), and despite his not having stipulated to the deposition, not more than 10 depositions are being taken until FRCP 30, Mr. Whetsell has not already been deposed in this case, and Mr. Whetsell is not confined in prison.

RESPONSE TO TSA'S ARGUMENT A

1. Mr. Whetsell was served in his individual capacity (see Exhibit B).
2. The Subpoena requested under rule 45 was also for Mr. Whetsell in his individual capacity, and documents in his control per case law discussed below.
3. The fact that Mr. Whetsell uses TSA documents as part of his job, does not mean that he does not have access, or the ability to obtain access to them. In fact, it is just the contrary!
4. Mr. Whetsell does have TSA documents in his posession, custody, or control as part of his job with TSA, since he uses the documents requested to perform his job. Additionally, Defendant (Polson) used the same documents to follow TSA guidance on how not to use excessive force in passenger pat-downs.

5. Case law states that since Mr. Whetsell has the named TSA documents in his possession, custody, or control, he is obligated to produce them per the Court's approved Subpoena:
   a) Mr. Whetsell's possession, custody, or control as defined, "documents that are potentially relevant to likely litigation "are considered to be under a party's control when that party has 'the right, authority, or practical ability to obtain the documents from a non-party to the action.'" Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 515 (D. Md. 2009)
   b) "Control" in this context has also been defined as "the legal right, authority, or ability to obtain upon demand documents in the possession of another." American Rock Salt Co. v. Norfolk Southern Corp., 228 F.R.D. 426, 460 (W.D.N.Y. 2005)
   c) It is non-believable that Mr. Whetsell does not have access, nor the practical ability to obtain TSA documents that he uses as guidance for his daily job.
   d) Defense Counsel Murley previously referenced these TSA documents as part of Defendant's FRCP 12(b)(6) Motion and claiming that Defendant Polson's actions were authorized by TSA guidance. If Defendant and Defense Counsel could access these documents as part of their defense, and 49 USC 114(r) which states that SSI may not be used "(A) to conceal a violation of law, inefficiency, or administrative error; or (B) to prevent embarrassment to a person, organization, or agency, then Plaintiff MUST be provided the same documents as ordered per the subpoena to William Whetsell for production on 20 October 2017.
   e) Furthermore, case law has demonstrated (see above in this reply) that TSA's claims of SSI do not meet the standard in Gordon v. FBI (ND Calif, 2004), where the Court held that "General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden" for witholding of documents as SSI.
6. The specifics of pressure used by TSOs (Transportation Security Officers, like Defendant Polson) are critical to this case, and included in information that Defendant cited in his disclosures (See Exhibit A) to be relevant to this case.
7. TSA attorney Sylvertooth refers to 6 CFR 5.41-5.49, however, Mr. Sylvertooth violates his own regulations by not demonstrating that he has taken appropriate steps (reasonable

to have been known since the filing of this case) to permit disclosure of documents Mr. Sylvertooth now attempts to quash.

Under 6 CFR 5.46(a)(3)-(4), TSA's counsel is obligated to have attemped to secure any TSA approvals necessary for even the minimal pressure-force guidance given to TSOs. Per the statute, Counsel shall:

> (3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Department official; and
>
> (4) Respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

Neither of these required activities above by TSA Counsel have occurred, again proving that TSA is attempting to stall and improperly delay these proceedings, to where the Court should use its inherent power to DENY TSA's Motion to Quash and permit the required production of documents at the deposition of Mr. Whetsell in his individual capacity.

8. TSA self-servingly "construes" the subpoena as being on itself, but the notice in advance of the subpoena clearly demonstrates (see Exhibit B) that William Whetsell was served in his individual capacity, and documents are to be provided by Mr. Whetsell (not by TSA, which Plaintiff points out that TSA is NOT named as a party on the subpoena), since under Goodman, and American Rock Salt, the limited set of documents requested are in Mr. Whetsell's control, as part of his job function at TSA. It is within Mr. Whetsell's authority and ability to obtain the documents that he uses daily to perform his duties, and 49 USC 114(r) which pre-empts over "any other provision of law", states that SSI may not be used "(A) to conceal a violation of law, inefficiency, or administrative error; or (B) to prevent embarrassment to a person, organization, or agency. 49 USC 114(r) thereby trumps and renders TSA's citation of 6 CFR 5.41-5.49 as moot.
9. 49 USC 114(r), 49 USC 1520.5(4)(A)-(B), 49 USC 15.11(a)(4-5), and 49 USC 1520.11(a)(4-5) all authorize and compel release of all subpoenaed documents to Plaintiff, overcoming TSA's objections on page 4 of TSA's motion related to FRCP 45(d)

(3)(A)(iii), since TSA has also not met the pleading standard under Gordon v. FBI (ND Calif, 2004), where the Court held that "General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden" for witholding of documents as SSI.

10. TSA also repeatedly ignores the known fact that Plaintiff, a commercial airline captain, is authorized under TSA's own guidance for receipt of SSI ("Those with a need to know [SSI] include persons outside of TSA, such as airport operators, aircraft operators, …." (see DHS/TSA/FAA Policies and Procedures regarding SSI, 2003).) rendering TSA's objections related to SSI further to be moot.
11. On TSA's motion page 5, TSA falsely claims (and is furtively but failingly wishing) that Plaintiff were asking for TSA's SOP. Plaintiff is not. Aside from TSA not meeting the pleading standard under Gordon for Plaintiff's requested information, TSA mis-cites case law and neglects that Plaintiff is only asking for pressure and avoidance of excessive force in pat-downs of thighs, groins, and genitalia – all specific and relevant to this case, and admitted as relevant in Defendant Polson's disclosures (see Exhibit A).
12. TSA's threat on page 5 against Mr. Whetsell is self-serving, if TSA itself refuses to authorize the documents ordered per the subpoena to be disclosed. TSA is effectively attempting to hold Mr. Whetsell as a human shield against Plaintiff's requested subpoena.
13. The fact that other courts have held TSA's SOP as SSI is irrelevant: Plaintiff is NOT asking for TSA's SOP, and multiple answers above have already answered Plaintiff's statutory authorization, need to know, and TSA authorization for Plaintiff to receive the requested documents, which have not been properly defined as SSI in the first place!

RESPONSE TO TSA'S ARGUMENT B

14. Exhibit B already demonstrates that William Whetsell was served in his individual capacity, and Exhibit A shows that the co-embodied TSA and Defendant's counsel did not provide, and refused under meet-and-confer, to provide any address for servide of process for Mr. Whetsell.
15. It is noteworthy that TSA and MWAA initially refused to identify Michael Polson as the felony sexual battery suspect whom Plaintiff citizen's arrested on 10 March 2016.

a) Plaintiff had to obtain Polson's name through police and other reports, but afterwards, TSA refused to cooperate and accept service of the case subpoena, and refused to provide Michael Polson's address,which Plaintiff eventually uncovered.

b) TSA is trying the same game here, refusing to disclose William Whetsell's address (see Exhibit A), refusing to accept service for Mr. Whetsell (as unrepresented by Mr. Sylvertooth), and then expressing fear and outrage that Plaintiff properly tracked down Mr. Whetsell and used a process service for personal service of a Rule 30 Notice of Deposition, and the Subpoena that this Court approved.

16. Plaintiff did not have Mr. Whetsell's address when Plaintiff filed his Rule 45 request for a subpoena, otherwise Plaintiff would have listed Mr. Whetsell's address on the subpoena. Plaintiff's listing of Mr. Sylvertooth's name and address on the subpoena were solely Plaintiff's best efforts to supply the most likely conduit for service, but Mr. Sylvertooth has nonetheless refused to cooperate in this matter.

17. Plaintiff shares Mr. Whetsell's concern for privacy! That is why Plaintiff requested that this case be sealed or redacted, but Hon. Judge Cacheris respectfully ruled that Court policies of openness and transparency pre-empted Plaintiff's request. The same rules that apply to Plaintiff, unsurprisingly, apply to Defendant, and to witnesses.

18. Plaintiff had no desire to be forced to track down Mr. Whetsell, however, if Defendant had provided an address in Exhibit A, or if Mr. Sylvertooth would have accepted service, then this would not have been necessary. TSA agents have no special standing against service of process at their homes, and TSA's objections are therefore moot.

19. TSA's objections on page 7 of their motion, contrary to the Notice (see Exhibit B) of Mr. Whetsell's service in his individual capacity, contrary to TSA's attorney confirming in Exhibit A that Mr. Whetsell was not represented by counsel (and especially not Defendant's/TSA's same counsel of Mr. Sylvertooth), and TSA's blythe ignorance of the Court-filed service of process ignore facts, mooting TSA's claims.

CONCLUSION

For cause as demonstrated herein, Plaintiff contends that TSA's Motion to Quash be DENIED, and that the Court's Order for William Whetsell to produce documents be affirmed. Plaintiff further suggests that based on TSA Counsel's strident objections and

related doubt as to whether TSA will decline to recognize 49 USC 114(r) and TSA's inherent right to the information requested, that this Court consider an Order (as suggested) to require TSA to approve and permit Mr. William Whetsell to produce the documents requested by Plaintiff and approved under Rule 45 by this Court.

SUGGESTED ORDER

On review of 3rd party TSA's Motion to Quash, this Court finds that TSA's Motion is hereby DENIED. Furthermore this Court finds that:

1. TSA did not comply with CivLR 7E and 37E;
2. TSA did not meet the pleading standards under Gordon v. FBI (ND Calif, 2004), as held that "General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden."
3. TSA's claims of exemption and SSI under 6 CFR 5.41-5.49 fail under 49 USC 114(r)'s explicit pre-emption over "any other provision of law", stating that SSI may not be used "(A) to conceal a violation of law, inefficiency, or administrative error; or (B) to prevent embarrassment to a person, organization, or agency. 49 USC 114(r) thereby rendering TSA's citation of 6 CFR 5.41-5.49 as moot and not in-force for the Subpoena as issued by this Court for 20 October 2017.
4. Documents requested for production by Mr. Whetsell as referenced by Plaintiff, with reference to *Goodman*, and *American Rock Salt*, are in the custody or control of individual capacity Deponent Mr. William Whetsell as part of his job functions at TSA.
5. TSA is therefore ORDERED to permit Mr. William Whetsell to produce the limited set of documents listed on the subpoena approved by this Court, and failure to comply with this Order may subject each of Mr. William Whetsell, TSA, and TSA's Counsels to sanctions, including being held in Contempt of Court.

It is so ORDERED.

Hon. _____ Date: _____

EXHIBIT A

Disclosures from Defendant per Rule 26. The signature page listing DOJ Attorney Sylvertooth, DOJ Attorney Barghaan, and DOJ US Attorney Dana Boente follows.

admissible. Further, in providing these disclosures, Mr. Polson does not waive any objections, defense, or applicable privileges.

(1) Rule 26(a)(1)(A)(i)

Witness	Subject Matter(s)
Susan Callaghan, Transportation Security Manager Contact information unknown.	- Her role and involvement in or concerning the March 10, 2016, incident, which is the subject matter of the instant civil action; - Her job responsibilities; and - TSA rules, regulations, and policies concerning the aviation screening process.
Carl Johannes, Transportation Security Manager Contact information unknown.	- His role and involvement in or concerning the March 10, 2016, incident, which is the subject matter of the instant civil action. - His job responsibilities; and - TSA rules, regulations, and policies concerning the aviation screening process.
Scott Johnson, Federal Security Director Contact information unknown.	- His role and involvement in or concerning the March 10, 2016, incident, which is the subject matter of the instant civil action. - His job responsibilities; and - TSA rules, regulations, and policies concerning the aviation screening process.
Michael Polson, Individual Capacity Defendant Contact through undersigned counsel.	- The March 10, 2016, incident which is the subject matter of the instant civil action - His job responsibilities; and - TSA rules, regulations, and policies concerning the aviation screening process.
William Whetsell, Supervisory Transportation Supervisory Officer Contact information unknown.	- His role and involvement in or concerning the March 10, 2016, incident, which is the subject matter of the instant civil action. - His job responsibilities; and - TSA rules, regulations, and policies concerning the aviation screening process.
Custodian, Transportation Security Administration Contact information unknown.	- Video footage from the closed-circuit television concerning the March 10, 2016, incident which is the subject matter of the instant civil action. - Policies and procedures relating to the recording and preservation of video footage.

Other Transportation Security Administration Employees identified in discovery documents, including subpoena responses.	- Knowledge of, and involvement in, the March 10, 2016 incident which is the subject matter of the instant civil action.
Metropolitan Washington Airports Authority Officers, Specific Officer Names unknown at the time. - Contact information unknown.	- The officers' involvement and investigation of the March 10, 2016 incident, which is the subject matter of the instant civil litigation.

Mr. Polson reserves the right to amend his Rule 26(a)(1)(A)(i) disclosures. Mr. Polson may also rely on individuals identified in Plaintiff's Initial Disclosures to support his defenses.

(2) **Rule 26(a)(1)(A)(ii)**

1. Statement from Michael Polson (Bates Stamped POLSON000001 - POLSON000002), which was produced to Plaintiff on September 11, 2017, in response to a request for production.

2. Video Footage of the March 10, 2016 incident, which has been produced to Plaintiff on several occasions, as well as within Plaintiff's possession as evident by Plaintiff attaching still images from the video to his Complaint.

3. Documents that may be released by Transportation Security Administration and the Metropolitan Washington Airports Authority in response to Plaintiff's subpoenas. Such documents will be in the Plaintiff's possession, with copies to be provided to Mr. Polson via the undersigned counsel.

Mr. Polson reserves the right to amend his Rule 26(a)(1)(A)(ii) disclosures. As discovery is ongoing, Mr. Polson reserves the right to supplement this list of documents and things. Mr. Polson may also rely on documents in the possession, custody, or control of the Plaintiff.

(3) **Rule 26(a)(1)(A)(iii)**

Not Applicable.

(4) **Rule 26(a)(1)(A)(iv)**

Not Applicable.

Respectfully submitted,

DANA J. BOENTE
United States Attorney

By: /s/

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Attorneys for the Federal Defendant

EXHIBIT B

Copy of FRCP 30 Notice of Deposition under FRCP 30 of 3rd Party William Whetsell, in His INDIVIDUAL CAPACITY, served by process server on Monday 09 October to ensure reasonable notice to Mr. Whetsell to attend. This was prior to issuance by the Court compelling his appearance, or for his to produce documents.

Despite Plaintiff explicitly stating that the deposition is for William Whetsell in his INDIVIDUAL CAPACITY both in the Notice title, AND in paragraph 4, TSA Attorney knowingly and repeatedly claimed otherwise, in violation of FRCP 11(b), which a Notice to Admit and a Notice of Planned Rule 11 Sanctions will address and strive to correct.

Attachment A

Capt. James Linlor, pro se
1405 S. Fern Street #90341, Arlington, VA 22202
(775) 298-1505

Mr. William Whetsell, an employee of TSA
Previous supervisor of Defendant Michael Polson
address tbd
phone tbd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CAPT. JAMES LINLOR, pro se Plaintiff, v. MICHAEL POLSON, in his individual capacity Defendant	Case No.: 1:17cv13 (AJT/JFA) **NOTICE OF DEPOSITION UNDER FRCP 30 OF 3rd PARTY WILLIAM WHETSELL, IN HIS INDIVIDUAL CAPACITY** Friday 20 October 2017 beginning 14:00 (2pm) Location: 1010 Cameron Street, Alexandria, Virginia 22314

1. PURSUANT TO FRCP 30, YOU, WILLIAM WHETSELL, ARE REQUIRED TO ATTEND THE FOLLOWING DEPOSITION. IF YOU DO NOT ATTEND, FRCP AUTHORIZES CLAIMS FOR SANCTIONS AGAINST YOU.
2. Plaintiff and Defense Counsel/Defendant previously agreed for a deposition to occur in or around Alexandria, VA, of Michael Polson on Friday, 20 October 2017.
3. Michael Polson's TSA supervisor, William Whetsell, is identified in responsive documents produced under Subpoena to Plaintiff. Mr. Whetsell is identified as making statements and having evidence pertinent to this case.
4. Plaintiff hereby notices Mr. William Whetsell that he will be deposed in this case IN HIS INDIVIDUAL CAPACITY beginning at 2:00p at Casmo & Associates, **1010 Cameron Street, Alexandria, Virginia 22314** (ph 703-837-0076) and that THIS DEPOSITION WILL BE VIDEOTAPED in addition to audio and stenographic recording.

5. A shortened half day (3 hours) as allowed by FRCP is anticipated.

NO ATTORNEY ASSISTED IN THIS DOCUMENT'S PREPARATION.
I certify under penalty of perjury, that a copy of this document was served on the Deponent on the date as listed, via process server, and that all other parties to this case have been notified via fax and certified US Mail.

Respectfully submitted, and made with the declaration that all statements in this pleading are true and correct under penalty of perjury.

Date 10/6/17 Signed _____(Capt. James Linlor)

Capt. James Linlor
1405 S. Fern Street #90341, Arlington, VA 22202 (775) 298-1505

Mr. William Whetsell
address and telephone # tbd

NO ATTORNEY ASSISTED IN THIS DOCUMENT'S PREPARATION.

I certify under penalty of perjury, that a copy of this document was served on 16 October, 2017, via filing with the EC/CMF Court Filing System, as well as service by mail on the Individual Capacity 3rd party William Whetsell, whose representation by counsel is still in-doubt. The copy to Mr. Whetsell is planned for by a 3rd party process server via secondary mailing on 17 October 2017, with service to be filed with the Court.

Local Rule 7(E) and 37(E) Certification per Scheduling Order of 06 September 2017: "Pro Se Plaintiff confirms that he has attempted, in good faith, to confer with and to decrease and/or resolve any matters of disagreement related to discovery with Defendant's Counsel, and to decrease, in every way possible, the filing of unnecessary motions."

Respectfully submitted, and filed with the declaration that all statements in this pleading are true and correct under penalty of perjury.

Date __10/16/17_____ Signed ___/s/ JL_____(Capt. James Linlor)

Capt. James Linlor, pro se
1405 S. Fern Street #90341, Arlington, VA 22202
(775) 298-1505

WILLIAM WHETSELL, in his individual capacity
111 Fairfax Dr,, Stephens City, VA 22655
(No notice of attorney representation)

MICHAEL POLSON, in his individual capacity
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c/o Dontae Sylvertooth, Asst US Attorney
2100 Jamieson Ave, Alexandria, VA 22314
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